No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

vs.

LESTER E. ERICKSON, JR., ET AL.

Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

vs.

HARRY R. McMANUS, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE RESPONDENT JEANETTE WALSH

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QUESTION PRESENTED

Whether federal employees can be sanctioned both for misconduct and for falsification for denying the facts underlying the misconduct.

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STATEMENT

Respondent Jeanette Walsh was employed by the Department of Veteran Affairs as a Social Service Assistant in the agency's medical center in St. Cloud, Minnesota. Pet. App. 2a. In 1988 the agency received information that Walsh had engaged in a sexual relationship with a chemical dependency inpatient at the center. Resp. Walsh App. A6; Pet. App. 32a. Both Walsh and the patient were interviewed and both denied the relationship. Resp. Walsh App. A6. In July 1991 the patient changed his story and complained that he had had a sexual relationship with Walsh while he was an inpatient at the center. Pet. App. 33a. Walsh was again interviewed by agency investigators and again denied that she had an intimate relationship with the patient while he was an inpatient between April 1988 and November 1, 1988. *Id.* at 32a. Walsh was subsequently served with a removal notice charging her (1) with having an intimate sexual relationship with a patient while he was an inpatient at the center, (2) for improper financial dealings with patients, and (3) for providing false and misleading information on seven different matters, including denying engaging in an intimate relationship with the complaining patient while he was an inpatient at the medical center. Resp. Walsh App. A2-4.

In an initial decision, an administrative judge found that the agency had failed to prove the intimate relationship, the improper financial dealings, or *any* of the falsification charges. Walsh Initial Decision (No. CH-0752-92-0021-I-1) (MSPB Feb. 7, 1992); Resp. Walsh App. A4-14. The Department of Veteran Affairs petitioned the Merit Systems Protection Board for review. The

MSPB reversed in part, finding that Walsh had engaged in sexual relations with an alcohol-dependent patient at the agency medical center, but also holding that an agency may not charge an employee with misconduct and separately charge her with falsification for denying the underlying misconduct. Pet. App. 42a.

This decision was combined with MSPB decisions in Erickson, Barrett and Roberts, and Kye, and appealed to the Court of Appeals, which affirmed in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996). The reasoning of the court of appeals is adequately set forth in the Statement of the Case of the petitioner. Pet. Br. 11-13.

SUMMARY OF ARGUMENT

Petitioner's argument is predicated upon the assumption that an employee's denial of work-related misconduct which is subsequently proven constitutes a false statement. According to petitioner, the court of appeals' recognition of a federal employee's right to deny both the charge and the related facts without being subject to a falsification charge is tantamount to creating an "expansive right to lie." While advancing this position, petitioner neglects the distinction between an active attempt to deceive or mislead, which is undoubtedly a falsification, and a simple denial of factual allegations of misconduct, which is generally viewed as neutral and intended primarily to preserve one's right to maintain a defense to charges.

Under federal law, in order to establish a falsification charge, an agency must establish by preponderant evidence that the employee knowingly imparted false information with intent to deceive or mislead the agency. The words "mislead" and "deceive" imply affirmative declarations of fact designed to create false impressions to lead the agency astray. However, when an agency conducts a full investigation and formulates factual allegations which its investigators propound to the employee with a demand to admit or deny, the denial of those facts is not a "lie" or "false statement", both as a matter of logic and language, and as an exercise of the employee's due process right to deny the charge and to require the agency to prove the charge by substantial evidence. By its very nature, a denial under these circumstances is not a falsification and does not subject the employee to additional penalties even if the charge is subsequently proven by substantial evidence.

Due process implications arise from the agency's depriving or seeking to deprive an employee of the property interest in his employment by doubling up a misconduct charge with a falsification charge stemming from the employee's denial of the facts underlying the misconduct. In Walsh's case, the penalty for the misconduct charge was a 90-day suspension; the penalty for the combination charges was dismissal from her position. In addition, the threat of new charges for falsification for the denial of the factual basis of misconduct creates a "chilling effect" on employees' rights to defend themselves.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT DENIALS OF CHARGES AND RELATED FACTS ARE NOT GROUNDS FOR SEPARATE FALSIFICATION CHARGES AND CANNOT BE CONSIDERED IN DETERMINING A PENALTY

The issue in this case is whether federal employees can be sanctioned both for misconduct and for falsification for denying the facts underlying the misconduct. The court of appeals held that denials of misconduct charges and related facts cannot be considered in determining a penalty.

A. Allowing Agencies To Charge Employees With Falsely Denying Facts Underlying Misconduct Charges Is Inconsistent With Employees' Due Process Rights To Defend Themselves

Under the Fifth Amendment, "No person shall be . . . deprived of . . . property, without due process of law. . . . " "The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interest." *Gilbert v. Homar*, 117 S.Ct. 1807, 1811 (1977); *see also, Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Tenured federal employees have a protected property interest in their employment. *See* 5 U.S.C. § 7513 (1994). Procedural safeguards of this property interest are provided by 5 U.S.C. § 7513(b) (1994), which allows for notice, a reasonable time to respond, legal representation and a written, reasoned decision. While this statute

facially provides federal employees with adequate procedured safeguards (*see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-548 (1985)), the more difficult question involves the due process implications of depriving federal employees of the property interests in their jobs by attaching penalties for falsification resulting from an employee's denial of the factual basis of a charge of misconduct. In finding the double sanction to be a denial of due process, the court of appeals summarized its rationale in *Grubka v. Department of Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988):

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. . . .

The court noted that "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." Pet. App. 16a. The court also declared:

> An agency has means to prove charges other than through admissions or denials of an employee under investigation. While it might be easier for an agency to prove a charge by using the leverage of an added charge of falsification to compel admissions, due process requires that an employee be allowed to deny both the charge

and the underlying facts without being subject to a falsification charge.

Ibid. at 19a.

The actual threat of additional penalties was confronted by Walsh when she was required to give a taped interview in 1991. The Veterans Administration had already secured ten written statements and had, by its investigator's admission, "consistent" and "very reliable" evidence that Walsh had engaged in misconduct. When its investigators conducted their interview of Walsh, they posed precise and detailed questions to her, requiring her to steer between the Scylla of admission, which would have effectively prevented a defense, and the Charybdis of denial, which carried the announced threat of enhanced sanctions. This dilemma was totally unlike the circumstance posed by *United States v. Dunnigan*, 507 U.S. 87 (1993), where the defendant could have avoided the increased sentence by declining to testify. When Walsh was asked to admit or deny, she was compelled to respond. See *Weston v. HUD*, 724 F.2d 943 (1983). She was not protected by any Fifth Amendment rights which allowed her either to remain silent or to refrain from testifying.

Moreover, the extent of the federal employee's dilemma under these circumstances is compounded because the penalties for falsification resulting from the denial of facts may actually prove more severe than for the underlying misconduct. In *Walsh*, when the MSPB reversed the administrative judge determination and found that the charge of having an intimate relationship with an inpatient of the medical center was proven,

Walsh received a penalty of a 90-day suspension. By comparison, the Veterans Administration was seeking dismissal for the combined charges of sexual misconduct and falsification.

When the V.A. investigators required Walsh to submit to an interview regarding her conduct, they did not forego the opportunity to apply additional pressure upon her. They informed her that they had a strong and thoroughly reliable case against her.[1] They also told her that she could be assessed with additional penalties "for not answering the questions right." See footnote 1. The court of appeals recognized the coercive potential that is implicit in these situations: "If agencies were allowed to inform employees under investigation for misconduct

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[1] Near the conclusion of her interview, an investigator asked: "A lot of the questions that we are asking are based on testimony from other interviews we have conducted with other individuals through the course of this investigation. There are a lot of consistencies from the number of persons that have responded and they are very reliable and they are consistent from person to person. These persons have not had any contact with any other individuals that we have interviewed. In the course of this we do want to remind you that you do have the right to representation but you also have the obligation and responsibility to truthfully answer the questions we ask you to the best of your knowledge. You can be held accountable for not answering these questions right so proven from other matters within the investigation. And I think it is in your best interest that you answer these questions as honestly and as best you can recollect. With that, I will ask you were you intimately involved, did you have any sexual relationship with Richard Brown while he was a resident of the Domiciliary?" Jeanette Walsh Interview Transcript, p. 19.

that their denial of facts may subject them to an additional falsification charge, they may be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." Pet. App. 16a-17a. The court expressed concern that this might leave employees without a meaningful opportunity to respond or provide a defense, or at the least would create a "chilling effect" on their clear right to defend themselves. *Ibid.*

The dilemma is further complicated by credibility factors. The court of appeals noted that to render "denials as actionable falsehoods might too readily transform credibility determinations into separate charges of falsification." Pet. App. 17a. *Walsh* is a perfect example. After Walsh was removed from her position on two misconduct and seven falsification charges, an administrative judge found that none of the agency charges had been proved. However, the sexual misconduct charge was later reversed by the MSPB because of inconsistencies in Walsh's statements which the MSPB found justified discrediting other parts of her testimony under formal evidentiary presumptions. See Pet. App. 32a.[2] The fact that

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[2] The MSPB reversed the administrative judge because Walsh admitted a "relationship" in November 1988 although she denied that it was sexual at that time. The MSPB found that Walsh's statement and later affidavit were inconsistent, tipping the decision against her. The patient, on the other hand, was a lifelong alcoholic and had a history of conflicting stories. The sexual relationship was raised in 1991 by the patient's wife who was outraged by the prospect of the patient entering a long-term chemical dependency treatment program in Wisconsin,

Walsh's inconsistent statements were given three years apart and did not themselves touch upon the key question of whether she had a sexual relationship with an *inpatient* of the medical center, reinforces the court's concern that close credibility determinations make it difficult to find that an employee is ipso facto guilty of falsification only because the underlying charge is sustained.

B. The Court Of Appeals Ruling Does Not Sanction A "Right To Lie."

Petitioner argues that there is no constitutional right to lie or to make false statements. No one takes issue with this broad assertion. The decision of the court of appeals is emphatic that "employees do not otherwise have a right to lie or make false statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges." Pet. App. 21a. Petitioner's complaint is that the court of appeals did not treat a denial of a charge or its related facts as a lie, a false statement, or a falsification; instead the court held that "an employee's denial of the factual basis of a charge may not be used as the basis for a falsification charge." Pet. App. 15a. The reason given by the court of appeals is that the "effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true." *Ibid.*

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when the same treatment was thought to be available at the V.A. Medical Center in St. Cloud, Minnesota, except for Walsh's employment there.

While the court of appeals took great care to define limitations compatible with the falsification rules used in the federal system, petitioner's brief dramatically changes the tone of the court's language. The word "denial" as used by the court of appeals is transformed by petitioner to "false statement". A "right to deny and defend" becomes an "expansive right to lie". Petitioner even recasts the overall issue to ask whether due process precludes an agency from sanctioning an employee for making *false statements* to the agency regarding employment-related misconduct. This refashioning of the terminology, although effective advocacy, essentially distorts the true issue presented in this petition, namely, whether denials of charges and related facts constitute falsifications warranting increased penalties.[3] The court of appeals made no suggestion that federal employees should be allowed to lie or tell false statements, and petitioner is undoubtedly right that there is no constitutional protection for such activity.

While there is no constitutional right to lie, petitioner's brief is silent on the critical issue relating to the legal criteria for a falsification charge under federal law. In order to establish a falsification charge, an agency must establish by preponderant evidence that the employee knowingly imparted false information with specific intent to defraud or mislead the agency. *Howard v. Department of Treasury*, 46 M.S.P.R. 492, 494 (1990);

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[3] Notably, the falsification charge against Walsh was: "You denied having an intimate relationship with Mr. Brown while he was an inpatient at the medical center." See Resp. Walsh App. A4.

Naekel v. Department of Transportation, 782 F.2d 975 (Fed. Cir. 1986) (the charge of falsification of a government document requires proof not only that the answer is wrong but also that the wrong answer was given with the intent to deceive or mislead the agency).

In evaluating an employee's conduct, it is useful to consider the key elements of a falsification charge. By definition, falsification requires not only that the answer be wrong but that it be made with the intent to deceive and mislead. Here ordinary dictionary definitions are helpful. "Deceive" means "to cause to accept as true or valid what is false or invalid".[4] "Mislead" means "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit."[5] "Lie" means "to make an untrue statement or allegation, with intent to deceive or to create a false and misleading impression."[6] "False Statement" means an untrue "report of facts or opinions" or an untrue "declaration or remark."[7] All of these represent affirmative declarations of fact or opinion, often with a dishonest purpose. By contrast, the term "denial" implies the more passive quality of "refus[ing] to admit the truth or reality (as of a statement or charge)."[8] Denial is responsive, not assertive; it seeks to traverse a statement, not to misdirect or to lead astray.

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[4] Webster's Ninth New Collegiate Dictionary (Merriam-Webster, Inc. 1988), p. 329.

[5] *Ibid.*, p. 759.

[6] *Ibid.*, p. 689.

[7] *Ibid.*, p. 1151.

[8] *Ibid.*, p. 339.

In the *Walsh* case, the denials consisted of Walsh answering "no" to a series of detailed questions propounded by agency investigators alleging misconduct. Although the denial of sexual misconduct was the "wrong answer" in light of the MSPB's eventual decision that the agency had sustained that charge, the denial still did not satisfy the substantial evidence standard[9] for falsification which requires an intent to deceive or mislead. An examination of the Walsh interview transcript shows that both the investigator's questions and Walsh's answers presented little scope to deceive or mislead. Walsh was the eleventh witness interviewed during the investigation. She was told that the other interviews were consistent and "very reliable".[10] The questions themselves were mostly statements of fact, detailed and specific, and calling for yes or no answers. Walsh's responses were negative and defensive, offering little opportunity to misdirect the agency. The Veteran's Administration was not diverted from its purpose: it acted immediately to remove her from her position on both misconduct and falsification charges.

An examination of Walsh's interview also plainly indicates that the goal of the agency investigators was not to gather information but to obtain admissions from Walsh that would have had the effect of foreclosing any chance of defense. From the outset, the investigators announced to Walsh that they had reliable and consistent information from others. Walsh was not so much asked for information as for *confirmation* of the facts the agency

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[9] See 5 U.S.C. § 7703(c)(3) (1994).

[10] See footnote 1.

already possessed. In actuality, she was asked to admit or deny charges. Her denials of these charges did not evidence an intent to mislead the agency but rather expressed her purpose to preserve her right to "deny and defend". The court of appeals recognized this right by holding that in the circumstances of Walsh's interview, denials were not actionable falsehoods. See *Naekel v. Department of Transportation*, 782 F.2d at 979 (no *per se* evidentiary rule that statement or omission establishes intent to deceive).

C. The Limited Right To Deny Charges And Related Facts Will Not Disrupt The Federal Employment System Or Other Important Disciplinary Systems.

Petitioner expresses a concern that the right conferred by the court of appeals to deny charges and related facts without being subject to additional sanctions for falsification represents a departure from existing precedent and will interfere with the ability of the federal government to determine when to discipline or remove employees who make false statements or otherwise engage in dishonest conduct. First, as the court of appeals explained, the refusal to consider an employee's denials of charges and related conduct as justification for an enhanced penalty is not inconsistent with *United States v. Dunnigan*, 507 U.S. 87 (1993). In that case, the Supreme Court held that the sentence of a criminal defendant who commits perjury at trial may be enhanced under federal sentencing guidelines. There are significant distinctions between the perjury of a criminal defendant at trial and the denials of a federal employee in an interview. The

foremost distinction is that even though, during the sentencing stage, the district court uses a preponderance of evidence standard in making findings that the defendant's false testimony constituted a willful obstruction of justice, the court can freely rely, as it did in *Dunnigan*, upon the jury verdict rendered beyond a reasonable doubt that the defendant's testimony was perjured. *See* 113 S.Ct. at 1114. By contrast, the findings in *Walsh* were based on credibility determinations using evidentiary presumptions. Moreover, the denials in *Walsh* were compelled and were not designed to influence the attitude of the investigators, who had already announced that they had a solid case against Walsh, but were instead meant to preserve her right to a meaningful defense.

Petitioner repeatedly returns to the theme that the court of appeals decision creates a broad-based "right to lie" or right to make deliberate falsehoods in the federal employment system or in other important disciplinary systems. However, most of the cases it submits in support of its position are not analogous with the present facts. In *United States v. Grayson*, 438 U.S. 41 (1978), the Court held that taking a defendant's false testimony into account did not violate due process and did not impermissibly chill his constitutional right to testify. The district court had concluded that the defendant's testimony "was a complete fabrication without the slightest merit whatsoever." 438 U.S. at 44. Similarly, in *Dunnigan*, the Court noted that "[g]iven the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the District Court's finding." 507 U.S. at 95-96.

In *Weston v. HUD*, 724 F.2d 943 (1983), the discharge of an employee was upheld when the employee refused to submit to questioning even when advised that criminal prosecution against her had been declined by the United States Attorney and that information gained from the interview could not be used against her in a criminal proceeding under *Garrity v. New Jersey*, 385 U.S. 493 (1967). See also, *Uniform Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972) (discharge proper where an employee refuses to answer questions after receiving *Garrity* protection).

These examples can be extended but they apply primarily to employees who engage in dishonest conduct relating to their employment. See 5 CFR. 735.203 (1997); *Gipson v. Veteran's Administration*, 682 F.2d 104, 1011-1012 (D.C. Cir. 1982) (upholding removal of employee for falsifying medical records). As stated throughout, there is no constitutional or legal authority approving dishonest conduct or false statements made with the intent to deceive or mislead. The court of appeals recognized this, but further recognized that denials of factual allegations made for the purpose of preserving an employee's right of defense do not fit into this category. Where an employee simply denies a charge or the underlying facts relating to that charge, it is improper for an agency to charge the employee separately with falsification or to consider the denial in determining the penalty. Pet. App. 21a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1997

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

JEANETTE WALSH, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER CH-0752-92-0021-I-1 DATE: February 7, 1992

John R. Koch, Esquire, St. Cloud, Minnesota, for the appellant.

Dale E. Parker, Esquire, Fort Snelling, St. Paul, Minnesota, for the agency.

BEFORE

Gregory A. Miksa
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 10, 1991, the appellant, Jeanette Walsh, appealed from the September 26, 1991 action of the agency that removed her from her position as a Social Services Assistant, GS-6, at the agency's St. Cloud, Minnesota Medical Center based on charges that she engaged in an intimate relationship with a patient of the Medical Center, that she further engaged in improper financial

dealings with patients of the agency, and that she provided false and misleading information to the agency. The Board has jurisdiction over the appealed action. *See* 5 U.S.C.A. §§ 7511(a)(1)(A), 7512(1), 7513(d) (West 1980); and 5 C.F.R. §§ 752.401(a) and (b)(1), and 752.405(a) (1991).

The appellant did not request a hearing concerning the issues raised by her appeal. Accordingly, this decision is based on the written submissions of the parties. For the reasons stated below, the agency's action is reversed.

ANALYSIS AND FINDINGS

At the time of her removal the appellant was employed as a Social Services Assistant in Building 9 at the agency's Domiciliary, a dormitory for inpatients being treated for alcoholism and substance abuse. From her supervisor's affidavit, and from the appellant's affidavit and statements, it appears that her interaction with the patients at that facility during the relevant time periods covered by the agency's charges was limited to issuing patient passes to leave the facility, conducting attendance checks, and making rounds from room to room to assure the patients' safety. According to agency substance abuse counselor Siri Krawchuk from Building 2 of the facility, at some point during the past three years the appellant began to assist her in Monday evening aftercare family sessions, attended by up to thirty-five former inpatients and their family members, at Building 2 of the agency's St. Cloud Medical Center. Ms. Krawchuk stated that the appellant's function at these sessions was limited to taking notes so that Ms. Krawchuk was free to guide the

sessions. *See* Agency file tab 4m. No other evidence was produced by the agency to show that as part of her official duties as a Social Services Assistant the appellant had any professional involvement in individual or group counseling with the facility's patients.

In an August 16, 1991 notice, the agency advised the appellant that her removal was proposed based on two charges. Under its first charge, engaging in improper relationships with Medical Center patients, the agency specified the following:

> A. You were involved in an intimate sexual relationship with veteran patient Richard Brown from September-November 1988 while he was under your care as an inpatient at the Domiciliary. This relationship continued until approximately April of 1990 while he was on an outpatient status. This relationship was viewed by others as unprofessional, detrimental to Mr. Brown, and counter to the treatment program prescribed for him.
>
> B. You were involved in financial dealings with beneficiaries of the VA as follows:
>
> - You sold Mr. Brown "Home Interior" products in the amount of $68.00. You also distributed literature and sold these products to other Domiciliary patients while on duty.
>
> - You recently provided a room in your home to patient Terry Neely. In exchange for his room, he paid you by performing labor around your home.
>
> You used your position as a patient care provider to your advantage in dealings with these

vulnerable veteran patients who were under your care.

See Agency file tab 4h, pg. 1.

Under its second charge, providing false or misleading information to a supervisor and to agency investigators, the agency specified:

A. You denied having an intimate relationship with Mr. Brown while he was an inpatient at this medical center.

B. You denied making repeated phone calls to Richard Brown at the Willet residence, Mr. Brown's sponsor, when in fact you called on numerous occasions.

C. You denied selling "Home Interior" products to inpatients of the Domiciliary, including Mr. Brown.

D. You denied calling anyone over Thanksgiving weekend 1988 regarding the medical condition of Mr. Brown, when in fact you did call Mr. Willet.

E. You denied ever purchasing a bottle of liquor for Mr. Brown over Thanksgiving weekend 1988; however, you told Mr. Willet when you called him that you had purchased liquor for Mr. Brown.

F. You persuaded Mr. Brown to conceal your relationship with him to your supervisor in December 1989 when he questioned you about it.

G. You stated that you first met Mr. Brown in a bar in North Dakota; *however, you had not met Mr. Brown until his admission to the Domiciliary in 1988.*

See Agency file tab 4h, pg. 2 (Emphasis supplied).

The agency's first charge is not sustained

It is undisputed that Mr. Brown was a patient at the St. Cloud Medical Center from April 1988 when he was admitted to an inpatient program in Building 2 of the facility. In May 1988, Mr. Brown was transferred to Building 9, known as the "Domiciliary," where he remained as an inpatient until he was discharged on November 1 1988. The appellant admits that she had a personal and intimate relationship with Mr. Brown, but only after Mr. Brown's discharge from the facility Domiciliary on November 1, 1988. She states that she did have sexual relations with the appellant in the summer of 1989 when Mr. Brown was not an inpatient or outpatient of the agency's facility. She further states that she served as Mr. Brown's "Concerned Person" in December 1989 when he was an inpatient at another local hospital facility, St. Cloud Hospital, which is apparently not associated with the agency's St. Cloud Medical Center. *See* Record tab 9. It is also undisputed that during his relationship with the appellant, Mr. Brown was not married and that he met his current wife, Donna, during his relationship with the appellant. The record shows that the appellant's relationship with Mr. Brown terminated when he married his current wife.

The record further shows that the agency's investigation of the instant charges was initiated as a result of a June 24, 1991 letter received from Donna Brown. In this correspondence, Mrs. Brown complained that staff at the agency's St. Cloud Medical Center had determined, after

her husband's recent alcohol abuse relapse, that her husband should be admitted as an inpatient at another substance abuse treatment center in Kennic Falls, Wisconsin because his previous relationship with the appellant precluded him from re-admission as an inpatient at the St. Cloud Domiciliary.

Mrs. Brown's allegations, and the agency's investigators' concurrence in those allegations (concerning the asserted impact of the appellant's relationship with Mr. Brown on the staff recommendation that Mr. Brown be treated at Kennic Falls) are not supported by the sworn testimony of Mr. Brown's treating therapists, counselors, and social workers. Statements of agency Social Worker James Broda; Treatment Coordinator John Pucel, Ph. D.; Substance Abuse Counselor Siri Krawchuk; and the appellant's supervisor, Dr. Ron Williams, establish that Mr. Brown's relationship with the appellant did not influence their decision to recommend treatment for Mr. Brown at the Kennic Falls Domiciliary. *See* Agency file tabs 4l through 4n. Their statements show that they prescribed Mr. Brown's treatment at Kennic Falls due to the higher degree of structured care afforded at that facility and the severity of Mr. Brown's alcohol abuse problem. Dr. Pucel and Mr. Broda noted that the staff was, in fact, willing to re-admit Mr. Brown to the St. Cloud Domiciliary despite the patient's previous relationship with the appellant. Only one agency witness, Mr. Dahlger, stated his belief that the appellant's prior relationship with Brown was a factor in the recommendation. But it is not clear what role, if any, Mr. Dahlger played in making this recommendation, or why he came to this belief. *See* Agency file tab 4p.

Ms. Krawchuk explained that after the recommendation to place Mr. Brown at Kennic Falls was made by the staff, Mrs. Brown became extremely angry because Mr. Brown's admission in Kennic Falls would place him at a greater distance from her home in the St. Cloud, Minnesota area. Mrs. Brown had previously stated, however, that she would not allow her husband to return to their home until he had established his sobriety for a period of six months. One agency witness, Irene Oberman, Mr. Brown's primary nurse, stated that the recommendation to place Mr. Brown in Kennic Falls was to "get him out of that relationship [with his wife] for a while." *See* Agency file tab 4o, page 2. According to agency witnesses familiar with Mr. Brown's case, they were unaware of any prior relationship between the appellant and Mr. Brown until Mrs. Brown expressed her anger at the recommendation that her husband be treated in Kennic Falls due to her belief that the recommendation was based on his prior relationship with the appellant. *See* Agency file tabs 4l to 4n.

The statement of the appellant's supervisor, Dr. Ron Williams, shows that Dr. Williams obtained information from an undetermined source in November or December 1988 that the appellant might have had an intimate relationship with Mr. Brown while Brown was an inpatient at the St. Cloud Domiciliary in the period fro [sic] September through November 1, 1988. Dr. Williams stated, however, that upon questioning Mr. Brown in November or December of that year, apparently after his discharge as an inpatient, Mr. Brown denied having such a relationship with the appellant while he was an inpatient at the Domiciliary. *See* Agency file tab 4t.

Nevertheless, Mr. Brown's July 19, 1991 affidavit shows the following exchange between Mr. Brown and agency investigators:

> Investigator #1: More specifically, your wife sent a letter to Ron Williams, Chief of Domiciliary Service, St. Cloud VA Medical Center, alleging that an affair of a personal nature had taken place between you and Jeanette Walsh, a VA medical center employee. And furthermore, that incident played heavily into your being sent to Kennic Falls halfway house rather than being placed in the Domiciliary there at St. Cloud VA. Do you care to elaborate on that. How do you feel about it."
>
> Witness #7 [Mr. Brown]: What you say is true. In 1988, on or about September I was in the Domiciliary out there and I did get intimately involved with Jeanette while I was a client at the Domiciliary.
>
> Investigator #1.: While you were a client at the Domiciliary?
>
> Witness #7: While I was a client at the Domiciliary. . . .
>
> Investigator #1: How long did the relationship last?
>
> Witness #7: I would say approximately 6-7 months. I left the Domiciliary on the 1st of November in 1988 and I would see her off and on at her place or at my quarters but I was seeing her and spending the weekend passes at her home while I was a client.
>
> Investigator #1: Did any activity take place in the Domiciliary?

> Witness #7: There was several different occasions where she would come up to my room and we would carry on in my room in the Domiciliary, Building 9 in particular.
>
> Investigator #1. What do you mean carry on?
>
> Witness #7: Hugging and kissing, *no sex in the Domiciliary; that took place at her home.*

See Agency file tab 4j (Emphasis supplied).

Elsewhere in his statement, Mr. Brown claims that he falsely told Dr. Williams that he knew the appellant in North Dakota before he entered treatment at St. Cloud because the appellant allegedly asked him to make that statement.

The only potential corroboration for Mr. Brown's statement about his alleged sexual relationship with the appellant while he was an inpatient is found in the statement of Dale Willet (taken jointly with his wife, Linda Willet). Mr. Willet admits that he does not know if the appellant's relationship with Mr. Brown during his inpatient stay in 1988 involved sexual activity. Mr. Willet states that he served as Mr. Brown's Alcoholics Anonymous [AA] sponsor from 1987 to late 1990 when Mr. Brown's recidivist drinking behavior, and a friendship which Mr. Willet states became too personal to sustain his sponsorship of Mr. Brown, resulted in a termination of the sponsorship. Mr. Willet generally stated that the appellant and Mr. Brown expressed affection for each other beginning during Mr. Brown's inpatient stay at the St. Cloud Medical Center in 1988. Mr. Willet stated that after a late October 1988 dance sponsored by AA known as a "Roundup," Mr. Brown asked to be dropped off at

the appellant's residence where he claimed to be staying that weekend, and that he complied with Mr. Brown's request. Mr. Willet also stated that he picked Mr. Brown up at a corner near the appellant's residence on a few occasions while he was an inpatient at the Domiciliary. Mr. and Mrs. Willet stated that Mr. Brown and the appellant talked to each other frequently on the telephone over the weekends when he visited them while he was in the Domiciliary. *See* Agency file tab 4s.

As noted, Mr. and Mrs. Willet were unable to state whether Mr. Brown's relationship with the appellant had advanced to a sexual relationship during the period of his inpatient stay at the Domiciliary. When asked if Mr. Brown had stated that his asserted intimacy with the appellant had reached the point of sexual activity, Mr. Willet specifically stated that "[Mr. Brown] never said anything to me about that." He also admitted that he never saw the appellant accompany Mr. Brown on any occasion while Mr. Brown was in the Domiciliary. *See* Agency file tab 4s. The Willet's statement does not show that they witnessed any overt act on the part of the appellant to advance her relationship with Brown when he was an inpatient.

At the conclusion of his interview with agency investigators, Mr. Willet stated that "at one time" the appellant "mentioned" that she "had to buy [Mr. Brown] liquor to keep him calmed down for whatever reason." He further stated that the appellant "affirmed purchased [sic] him a bottle of hard liquor," and that "she said she had gotten him some booze." *See* Agency file tab 4s. Although Mr. Willet states that he subsequently reported the alleged relationship between Brown and the appellant to the Ms.

Krawchuk and Dr. Williams in 1989 or 1990, Mr. Willet offered no information to show that he reported at any time to Dr. Williams, or to any other person at the agency's treatment center, the appellant's alleged statement that she furnished hard liquor to Mr. Brown.

The Willet's [sic] claim that they reported the appellant's alleged intimacy with Mr. Brown in 1989 or 1990 appears inaccurate insofar as Ms. Krawchuk recalls that the only investigation conducted on the matter was based on the Willet's [sic] complaint. Dr. Williams recalls that that investigation was conducted by him in November or December 1988. Moreover, I find implausible Mr. Willet's claim that the appellant admitted purchasing hard liquor for a former alcoholism patient of the agency's treatment facility since he, and the agency, provided no information to show that he ever reported this asserted action which would have had a far more direct bearing on Mr. Brown's sobriety than his asserted intimate relationship with the appellant. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 461-62 (1987). The inaccuracy of Mr. and Mr. Willet's recollection of their complaint to Ms. Krawchuk, and the implausibility of Mr. Willet's assertion that the appellant admitted that she purchased hard liquor for Mr. Brown diminishes, in my judgment, the probative value of the Willet's [sic] statement concerning the appellant's asserted contacts with Mr. Brown during the period April through November 1989 when Mr. Brown was an inpatient at the agency's St. Cloud facility.

The appellant's statements concerning the evolution of her relationship with Mr. Brown are more specific and consistent than the general and inconsistent statements provided by Mr. Brown. *See Hillen v. Department of the*

Army, 35 M.S.P.R. at 460-61. The appellant has consistently and emphatically denied that her relationship with Brown became intimate during his inpatient status at the Domiciliary in 1988. She has described in detail physical contacts, all initiated by Mr. Brown, both at the Domiciliary and at her residence which she claims to have resisted while he was an inpatient. These included an incident when he kissed her in his room and another when he appeared late at night at her residence, pushed his way into her residence, and unsuccessfully attempted to undress her while he was on a weekend pass. *See* Record tabs 1 and 9. Apart from stating that it took her until 3:30 or 4:00 a.m. on the one occasion when he entered her residence to persuade him to leave, she denies that she allowed Mr. Brown any interpersonal or sexual contact with her during his 1988 inpatient status at the Domiciliary.

I find the agency's allegation that the appellant entered an intimate relationship with Mr. Brown while he was an inpatient at the St. Cloud facility is not supported by preponderant evidence. I further find that the agency has not shown by sufficient evidence that the appellant's admitted sexually intimate relationship subsequent to his November 1, 1988 discharge began during a time when he was either an inpatient or outpatient at the agency's St. Cloud facility. In this regard I note that the statement from agency witness Richard Olson confirms the appellant's testimony that Mr. Brown was a patient at a local treatment facility other than the agency's St. Cloud Medical Center in late 1989 when the appellant served as Mr. Brown's "concerned Person." *See* Agency file tab 4v. I, accordingly, find that the agency's first charge against the

appellant, as it relates to her personal relationship with Mr. Brown as a patient at its St. Cloud facility, is not sustained.

Concerning the agency's second specification under charge one, I find insufficient probative evidence on this record to rebut the appellant's specific statement that Mr. Brown purchased "Home Interior" products from her sister, not from the appellant, in October 1989 at a time when he was not an inpatient of the St. Cloud Medical Center. Moreover, I find that the agency has produced insufficient evidence on this record to show whether Mr. Brown was a patient at the facility at that time. Mr. Brown's own statement that he purchased $68.00 worth of home care products "thru" the appellant is insufficient to show that these products were purchased from the appellant and not her sister. *See* Agency file tab 4j. I, accordingly, find that the agency has failed to support this aspect of its second specification by preponderant evidence.

Moreover, although the appellant admits that she was providing a room to a current out-patient Terry Neely in exchange for home maintenance and repair work at her residence, the agency has provided insufficient evidence from Mr. Neely that he entered into his living arrangement with the appellant at a time when he was either an inpatient or an outpatient at its St. Cloud facility. Mr. Neely's statement, in fact, shows that he arranged to stay at the appellant's residence at a time after he was discharged as an inpatient and after his private project in operating a "dry house" for recovering alcoholics failed. *See* Agency file tab 4q. According to Mr. Neely's and Ms. Krawchuk's statements, the question of

Mr. Neely's living arrangements with the appellant arose when he was considering readmission as an inpatient at the St. Cloud facility. The agency has produced insufficient information to show that Mr. Neely obtained his room from the appellant while he was under outpatient care at the St. Cloud Medical Center. I, accordingly, find that the agency has failed to establish its factual specification that the appellant engaged in an improper financial relationship with Mr. Neely while he was a patient at its St. Cloud facility.

The agency's falsification charge is not sustained

In order to establish its falsification charge, the agency must establish by preponderant evidence that the employee knowingly imparted false information with specific intent to defraud or mislead the agency. *See Howard v. Department of Treasury*, 46 M.S.P.R. 492, 494 (1990). Specific intent may be inferred when the misrepresentation is made with reckless disregard for the truth, or with the conscious purpose of avoiding learning the truth. *See Riggin v. Department of Health and Human Services*, 13 M.S.P.R. 50, 53 (1982), No. 82-1818 (4th Cir. August 22, 1983) (Table). Moreover, intent is a state of mind which is generally proven by circumstantial evidence. *See Filson v. Department of Transportation*, 7 M.S.P.R. 125, 132 (1981).

I do not find that the agency has established, by preponderant evidence, that the appellant's relationship with Mr. Brown was intimate at a time when he was an inpatient or an outpatient at its St. Cloud facility. I, accordingly, find that the agency's specification under section A. of its second charge is not sustained.

I further find that the statement provided by Mr. and Mrs. Willet in 1991 that the appellant frequently called Mr. Brown while he was at their residence on weekends when he was otherwise a patient at the Domiciliary in 1988 is not sufficiently accurate or plausible to sustain the agency's specification that the appellant falsely denied making such calls. In this regard, I note that the recollection of the Willets as to the year in which they raised their complaint about Mr. Brown's relationship with the appellant appears to be inaccurate based on the statements of Ms. Krawchuk and Dr. Williams as to their investigation of the complaint. Although Mr. Willet initially stated that Mr. Brown visited at his residence only when he was a patient at the Domiciliary, Mr. Willet later stated that Mr. Brown would show up, presumably at his residence as well as at his work location, when Mr. Brown had mood problems associated with his drinking and his relationship with the appellant. The appellant may, indeed, have contacted Mr. Brown at the Willet's residence on several occasions. I do not find, however, that the Willets' recollection of the timing of events surrounding Brown's relationship with the appellant, and particularly their own involvement in reporting that relationship to the agency's treatment center, is sufficiently reliable to find that they now accurately recall that the appellant's phone calls were frequent or made while Mr. Brown was an inpatient of the Domiciliary.

I have also found implausible and, hence, not credible, Mr. Willet's recent statement that the appellant stated that she had purchased hard liquor for Mr. Brown. I, accordingly, find that the agency's specifications B. and E. that the appellant falsely denied making phone calls to

Mr. Brown and purchasing liquor for Mr. Brown are not sustained.

Concerning specifications C, I have found that the appellant's sister, not the appellant, sold "Home Interior" products to Mr. Brown at a time when he was not an inpatient at the agency's facility. I otherwise find insufficient evidence on this record to support a finding that the appellant ever sold any such products to any other inpatient of the facility. I, accordingly, find that this specification is not sustained.

Concerning specification D. I find that during the agency's investigation, the appellant initially did not clearly deny that she called anyone regarding Mr. Brown's medical condition when she discovered Mr. Brown at his residence in an intoxicated condition on Thanksgiving weekend in 1988. Her response to the question whether she had made such a call, "I don't think so," appears to reflect a failure of her memory, not any intent to mislead the agency. Later she stated that she did not remember making such a call. She did specifically deny making a call to Mr. Brown's AA counselor concerning Mr. Brown's condition that weekend. Mr. Willet claims that the appellant did call him that weekend concerning Mr. Brown's condition. Although such a call may have been made to Mr. Willet, I do not find that the agency has produced sufficient evidence to show that the appellant intentionally falsified her response to agency investigators about making such a call to mislead them about any material fact in its investigation. I, accordingly, do not find that this specification is sustained.

Concerning specification F., Dr. William's statement shows that his inquiry into Mr. Brown's relationship with the appellant appears to have been made in December 1988, not December 1989 as stated in this specification. Moreover, I do not find credible Mr. Brown's assertion in his statement to agency investigators that the appellant asked him to conceal his relationship with her. This statement was apparently made after his current wife became upset with his treatment regime in Kennic Falls, and he was asked to explain why he, personally, did not confirm his relationship with the appellant when he was asked about it in a previous agency inquiry. I, accordingly, do not find that this specification is sustained.

Finally, the appellant has maintained that several years prior to Mr. Brown's admission to the St. Cloud Medical Center she once, briefly, met Mr. Brown in a bar in North Dakota. Mr. Brown now denies that this meeting occurred, although he indicates in his statement that he once told Dr. Williams that he had previously met the appellant in North Dakota. At no time has the appellant alleged, however, that she had any ongoing personal relationship with Mr. Brown until after his discharge as an inpatient on November 1, 1988. Accordingly, I find no basis for finding that the appellant intended to falsify her statement or mislead the agency by claiming that she had such a momentary contact with Mr. Brown at a remote time in the past. I, accordingly, do not find that specification G. is sustained by preponderant evidence.

Based on the foregoing, I find that the agency's charges in the instant case are not sustained by preponderant evidence. The agency's action must, accordingly, be REVERSED.[1]

DECISION

The agency's action is reversed.

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore appellant effective September 26, 1991. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest and benefits in accordance amount of back pay, with interest and benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar

[1] The appellant raised no affirmative defenses to the agency's action.

days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

If a petition for review is filed, I ORDER the agency to provide interim relief to appellant in accordance with Section 6 of the Whistleblower Protection Act of 1989, U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final.

FOR THE BOARD:

/s/ Gregory A. Miksa
Gregory A. Miksa
Administrative Judge